Supreme Court, U.S.
FILED
NOV 16 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79-774

PAUL LABRIOLA,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILLIAM SONENSHINE
Member of The Bar of
the Supreme Court of
the United States
Attorney for Petitioner
186 Joralemon Street
Brooklyn, N.Y. 11201
(212) 855-1111

I N D E X

		Page
A.	OPINION BELOW.....	1
B.	THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOLVED.....	2
C.	THE QUESTIONS PRESENTED FOR REVIEW.....	3
D.	STATUTES INVOLVED.....	3
E.	A CONCISE STATEMENT OF THE CASE AND THE MATERIAL FACTS PERTAINING TO CONSIDERATION OF THE QUESTIONS PRESENTED.	
	1. Statement of the case..	4
	2. Statement of Facts.....	6
F.	BASIS FOR JURISDICTION IN THE UNITED STATES DISTRICT COURT.....	6
G.	ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.....	6
POINT ONE	Petitioner was denied a speedy trial	7
POINT TWO	The denial of a speedy trial resulted in additional prejudice to petitioner.	21
CONCLUSION	The Judgment Below Should Be Reversed and the Indictment Dismissed.....	24

TABLE OF CASES CITED

	Page
United States v. Aprea, 358 F. Supp. 1126 (S.D.N.Y. 1973).....	9
United States v. Beberfeld, 408 F. Supp. 1119 (S.D.N.Y. 1976).....	9
United States v. Didier, 542 F.2d 1182 (2d Cir. 1976).....	12,13,16,19
United States v. Drummond, 511 F.2d 1049 (2d Cir. 1975).....	16
United States V. Mauro, 544 F.2d 588 (2d Cir. 1976), rev'd. 436 U.S. 340 (1978).....	7,9,14
United States v. Hillegas, 578 F.2d 453 (2d Cir. 1978).....	12
United States v. Lopez, 426 F. Supp. 380 (S.D.N.Y. 1977).....	12
United States v. Roemer, 514 F.2d 1377 (2d Cir. 1975).....	16
Other Authorities	
Title 18 U.S.C. Section 3161 (e) (Speedy Trial Act of 1974).....	12,15,23,24
Eastern District Plan for Prompt Disposition of Criminal Cases	12,15,20,24
Section 5 (a).....10	
Section 5 (b).....16	
Section 10 (c).....19	
Section 9 (a)(8)(A).....13	
Sixth Amendment to the United States Constitution.....	12,20,24

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No.

PAUL LABRIOLA,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The above named petitioner respectfully prays this Court for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit as follows:

A.

OPINION BELOW

The United States Court of Appeals for

the Second Circuit by judgment entered in that Court on September 4, 1979, (petition for rehearing and rehearing en banc denied on October 25, 1979) unanimously affirmed a judgment entered in the United States District Court for the Eastern District of New York on April 25, 1979 (Indictment No. 75 CR 659-S) convicting appellant of uttering forged United States Savings Bond upon his plea of guilty as an aider and abettor to violation of Title 18 U.S.C. Section 495 before Hon. Mark A. Costantino.

(By agreement between petitioner and the Government pursuant to Rule 11(e) of the Federal Rules of Criminal Procedure, petitioner preserved his right to appeal upon the speedy trial issues raised in the Courts below and by this petition).

Opinions were written by the Court of Appeals and by the District Court. Copies thereof are annexed hereto as Appendices A and B respectively.

B.

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction of this Court is invoked under Title 28, Section 1254, subdivision 1, of the United States Code, and under Rule 18, subdivision 1, of the rules of this Court.

The judgment sought to be reviewed herein is the judgment of the United States Court of Appeals for the Second Circuit entered on September 4, 1979, and petition

for rehearing and rehearing en banc, denied October 25, 1979. Said judgment of September 4, 1979 is incorporated within Appendix A, supra. The orders dated October 25, 1979 denying petitioner's petition for rehearing and rehearing en banc are annexed hereto as Appendix C-1 and C-2.

C.

THE QUESTIONS PRESENTED FOR REVIEW

1. Was petitioner denied a speedy trial between the period between November 1, 1976 and June 28, 1977?

2. Was petitioner denied a speedy trial between September 29, 1978 and February 15, 1979?

3. Was petitioner denied a speedy trial as a result of the aggregate delays between November 1, 1976 and February 15, 1979?

D.

THE STATUTES INVOLVED

The statutes involved are Title 18 U.S.C. Section 3161(e) (Speedy Trial Act of 1974); Sections 5(a), 5(b), 10(c), 9(a)(8)(A) of the Eastern District Plan for Prompt Disposition of Criminal Cases; and the Sixth Amendment to the United States Constitution. Each of the foregoing is set forth in Appendix D of this petition.

E.

A CONCISE STATEMENT OF THE CASE AND THE MATERIAL FACTS PERTAINING TO CONSIDERATION OF THE QUESTIONS PRESENTED

1. Statement of the Case

Petitioner and others were originally indicted jointly under indictment no. 75CR 659 in the United States District Court for the Eastern District of New York charging them with conspiracy to violate Title 18 U.S.C. Section 495. Petitioner moved to dismiss upon grounds of Double Jeopardy in that he had previously been convicted and sentenced to a prison term of 5 years in that Court (Ind. 73CR972) for the same conspiracy. The Government thereupon elected to moot that issue by obtaining a superseding indictment (the instant indictment) charging petitioner as an aider and abettor in thirty-eight substantive counts of violating Title 18 U.S.C. Section 495.

On March 25, 1976 petitioner, who was then incarcerated in state custody serving a New York State sentence for violations of state law based on the same facts which supported the first Federal indictment described above (75CR972) served notice upon the U.S. Attorney requesting that all pending indictments against him be disposed of pursuant to the interstate Agreement on Detainers.

On March 30, 1976, petitioner was arraigned under the instant superseding indictment (75 CR 695S). Trial was begun and a jury selected.

On the next day set for trial-May 1, 1976-petitioner made a motion pursuant to the Interstate Agreement on Detainers to dismiss the indictment on the ground that he had been taken from State Custody into Federal custody and then returned to State custody without having been tried.

Oral argument on petitioner's motion to dismiss pursuant to the Interstate Agreement on Detainers was had on May 12, 1976.

From that day forward there ensued a series of delays which gave rise to the speedy trial issued involved in this petition and culminating in petitioner's plea of guilty 2 years and 8 months later-on February 15, 1979. At that time it was also agreed by the United States Attorney that pursuant to Rule 11(e) of the Federal Rules of Criminal Procedure petitioner's right to appeal from the denial of his motions to dismiss the indictment for failure to provide a speedy trial would be preserved and that he would remain at liberty pending appeal to the Court of Appeals and if need be, pending determination of a petition for certiorari.

On February 15, 1979, petitioner was sentenced by Judge Mark A. Costantino to a three year period of incarceration. As stated above, he is at liberty pending determination of this petition.

On appeal to the Court of Appeals for the Second Circuit, that Court unanimously affirmed the conviction on September 4, 1979 Petitions for rehearing and rehearing en banc were denied on October 25, 1979. The instant petition is now brought to review

the determinations below as to the speedy trial issues.

2. The Facts

The pertinent facts are set forth under the appropriate Point headings infra and, accordingly, are not reiterated herein.

F.

BASIS FOR JURISDICTION IN THE UNITED STATES DISTRICT COURT

The jurisdiction of the United States District Court for the Eastern District of New York was invoked upon the ground that the crimes charged were violations of Federal law, to wit: Title 18 U.S.C. Section 495.

G.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

POINT ONE

PETITIONER WAS DENIED A SPEEDY TRIAL

As previously indicated the critical events in this case commenced on May 12, 1976 - the day petitioner's motion to dismiss under the Interstate Agreement on Detainers was argued in the District Court.

During the argument it was pointed out that another Judge of that Court (Bartels J.) had very recently granted a similar motion in the case of United States v. Mauro, and that the Government was about to appeal from that decision. Judge Costantino thereupon suggested that petitioner waive his speedy trial rights and put the case over for two weeks pending determination by the Court of Appeals, and disband the jury in the meantime.

Petitioner appeared agreeable to such an arrangement, but was interrupted by the Court when he made the following remark:

> "I want to know what I'm waiving. Am I waiving outside----"
> (Transcript May 12, 1976, p.18)

The Court, apparently anticipating a prompt decision, thereupon adjourned the case for a status report on June 4, 1976, with the caveat that "if we have the opinion by that time we start the trial on June 7th." (Transcript May 12, 1976 p. 33).

On June 4th, (in petitioner's absence) the case was adjourned to June 18th and, on that day, further adjourned over the summer to September 27th. No decision had yet been

rendered by the Court of Appeals in the Mauro case.*

It now became apparent that a decision in the Mauro case would not be rendered quickly. Petitioner thereupon wrote to his attorney (Court appointed) in August asking him to advise the Court that he wished to proceed to trial. Petitioner wrote again on September 24th to the same effect and again on October 6th. On the latter occasion (when petitioner learned that in his absence the Court had adjourned the case from September 27 to November 12) petitioner wrote to his attorney to file a write of mandamus for a trial. In addition, he wrote to the Court and the Assistant United States Attorney, seeking a trial but received no replies (A95-96).

Petitioner's desire to obtain a trial were unequivocally described in his subsequent letter to Chief Judge Mishler on December 13, 1976 (A-88):

> "I would like to know if the law on November 12, 1976 and December 10, 1976 is in my favor how could he postpone it in the Government's favor because they want a second crack at the circuit? What have I got to do with that case? Why, if he won't go by the law, can't I get a trial." (underscoring ours)

- - - - -

*On June 29, 1976 petitioner began serving his aforesaid 5 year federal sentence imposed in the Eastern District of New York under Ind. 73 CR 972 (A64). He was released in May, 1978.

On November 1, 1976 Petitioner filed a motion pro se (dated October 22, 1976) to dismiss the indictment alleging, inter alia, the Government's delay in prosecution and failure to provide a speedy trial. (A10, A84).

On October 12, 1976, the Court of Appeals decided the Mauro case affirming Judge Bartel's decision (544 F.2d 588).

At this point, petitioner's "waiver" of his right to a speedy trial clearly expired - if, indeed, it hadn't expired earlier, since it was not unreasonable for him to have believed on May 12th that a decision in Mauro should have been reached on or about June 4th as implied by the Court's suggestion to adjourn to June 4th to await the expected decision. (See, U.S. v. Beberfeld, 408 F. Supp. 1119 (S.D.N.Y. 1976); U.S. v. Aprea, 358 F. Supp. 1126 (S.D.N.Y. 1973)).

The case next appeared on the calendar on November 12, 1976 (having been adjourned to that date on September 27). At that time the Court was requested to decide the pending motion to dismiss under the Interstate Agreement on Detainers. The Court refused to do so, stating, over the protest of petitioner that it would await the outcome of an anticipated motion by the Government for an en banc rehearing in Mauro. (Petitioner had never consented to await the protracted time period of an en banc hearing.)

Thus, the delay now continued despite the clear revocation of the "waiver" by

petitioner's said motion filed November 1, 1976 or, alternatively, the expiration of the waiver period by virtue of the decision of October 26 in U.S. v. Mauro. If the "waiver" period had not expired in June, it certainly was terminated by October 26 or November 1, 1976 at the latest.

The 180 day time period began to run at least as of October 26. Section 5(a) of theEastern District Plan for Prompt Disposition of Criminal Cases provides that trial must commence within 180 days of arraignment in cases where (as here) the defendant was arraigned prior to July 1, 1977.

The Events of May 4, 1977 and thereafter

The motion remained pending and no further action was taken by the Court from November 1, 1976 until May 4, 1977 at which time further delay ensued.

The Government's motion for rehearing en banc in Mauro had been denied in the interim and the Government told the Court on May 4, 1977 that it would petition this Court for certiorari. The Government also suggested that the District Court await the outcome of two other cases then pending in the Court of Appeals. Petitioner's counsel objected pointing out that petitioner had been awaiting a decision for one year. The Court replied that petitioner had accepted "The Court's suggestion that the original motion be postponed pending a decision on the Mauro case."! Clearly no such "suggestion" had been accepted to await the outcome of the Government's petition for certiorari. (Transcript, May 4, 1977, p. 5-8).

Petitioner, who was present in Court for the first time in a year since the preceding May of 1976, addressed the Court:

> "Excuse me your Honor. I respectfully say that I withdrew that waiver, because I was under the -- I was misunderstood in that I waived until June 7th and the minutes will bear me out. When it went beyond that in October, prior to the Mauro decision, I filed under the speedy trial act and I filed to dismiss for failure to prosecute. That clearly shows I withdraw that waiver." (Transcript, May 4, 1977 p.9).

The District Court inquired whether petitioner had made such a motion in writing, apparently forgetting that the motion had not only been filed on November 1, 1976 but the Court had previously directed the Government to respond to it, which the Government did the previous December 3, 1976 - some six months earlier. (A-45).

When petitioner, in response to the Court's inquiry produced a copy of the motion papers, the Court stated, "I will take a look at that one. It must be in the file." The Court inquired of the Assistant U.S. Attorneys whether they were aware of the motion. One assistant stated he did not recall it; the other stated he had only been in the case since March and could not say if a response had been filed. (Transcript, May 4, 1977, p. 9-11).

At this point in time (May 4, 1977) a total of 184 days had already elapsed since the filing of the motion for a speedy trial on November 1, 1976, and 189 days had elapsed since the decision by the Court of Appeals in U.S. v. Mauro on October 27, 1976. Yet not only had the District Court not commenced a trial, but had apparently forgotten about the motion for a speedy trial and consequently had not decided it!

The delay continued unabated for an additional 55 days until June 28, 1977. On that date the District Court entered an Order dismissing the indictment solely on the Mauro issue -- without reference to petitioner's speedy trial motion (A-50). At this point, 239 days had elapsed since the petitioner moved to dismiss for failure to grant a speedy trial, and 234 days had elapsed since the decision in the Court of Appeals in Mauro.

Thus, the carefully conceived Eastern District Plan for Prompt Disposition of Criminal Cases was ignored, disregarded and, in the final analysis, totally violated in letter and in spirit.

The responsibility forensuring the Sixth Amendment guarantee of a speedy trial, as promulgated in the Speedy Trial Act of 1974 and Rule 50(b) of the Federal Rules of Criminal Procedure, and codified by the Eastern District Plan, places responsibility for speedy trials squarely - and properly - upon the Court and the prosecutor, not on the defendant. (U.S. v. Hillegas, 578 F.2d 453 (2 Cir., 1978); U.S. v. Lopez, 426 F. Supp. 380 (S.D.N.Y. 1977); United States v. Didier, 542 F2d 1182 (2Cir., 1976).

In considering the deprivation of a speedy trial we respectfully note the plan itself provides that speedy trial motions "shall be decided with promptness." (Eastern District Plan 10(c)). As indicated in United States v. Didier, 542 F.2d 1182, 1188 (2Cir., 1976), the time during which a speedy trial motion is pending cannot itself toll the time limits. To construe it otherwise "would improperly penalize defendants for invocation of speedy trial rules and run counter to the purposes of these rules." (id; at p. 1188).

At bar we are presented with the irony that the Court allowed petitioner's motion to dismiss to remain undecided for longer than the 180 day period during which he should have been brought to trial. The very making of the speedy trial motion was itself a demand for a speedy trial. (U.S. v. Didier, supra, at p. 1188).

The District Court has the power, pursuant to Rule 9(a)(8)(A) of the Plan, to exclude from the time period in which a trial must be commenced:

> "Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period

> of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.:

It would appear that the District Court's adjournment and delays find no justification under this provision of the Plan. To the contrary the circumstances dictated that only a speedy trial would serve the ends of justice, rather than unwarranted continuances as the record demonstrates occurred to the detriment of petitioner.

The matter did not end there, however. The Government appealed from the dismissal of the indictment. On November 10, 1977 the Court of Appeals affirmed. The Government filed a petition for a writ of certiorari.

On May 23, 1978 the Supreme Court reversed the Court of Appeals' decision in Mauro (436 U.S. 340, 98 S.Ct. 1834, 56 L.Ed. 2d 329).

On June 5, 1978 the Supreme Court granted certiorari in the instant case, vacated the affirmance below and remanded for further consideration in light of Mauro. The Court of Appeals, on

reconsideration reinstated the indictment by order dated July 24, 1979 (A54). Petitioner's motion for rehearing were denied by the Court of Appeals on September 29, 1978.

The ensuing delay following the denial in September 29, 1978 of the motions for rehearing was of itself a violation of the Speedy Trial Act of 1974 as well as The Eastern District Plan. Moreover, when considered with the delay prior to June 28, 1977 as already outlined, the combined events mandate dismissal of the indictment for denial of a speedy trial.

We commence by respectfully directing the Court's attention to certain basic precepts pertinent here.

The Speedy Trial Act of 1974 sets forth the following time limits (18 U.S.C. Section 3161(e)) with respect to re-trial after appeal:

> "If the defendant is to be tried again following an appeal or collateral attack, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final except that the Court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date occasioning the retrial becomes final if unavailability of witness or other factors resulting from passage of time shall make trial within sixty days impractical."

The Plan rules with respect to re-trials is essentially identical to the Act, and also mandates re-trial within sixty days of the date upon which the order requiring re-trial becomes final. Plan 5(b).

In United States v. Drummond, 511 F.2d 1049, 1054 (2d Cir. 1975). The Court of Appeals considered the speedy trial rules with respect to the time within which re-trial of an indictment must be had:

> "We stress however, that we will not tolerate a delay of this sort occuring in the future. Both the United States Attorney and the Judge to whom a retrial is assigned should closely monitor its progress. Otherwise, under the Speedy Trial Act of 1974, which establishes new outside limits for the commencement of retrials....the Government may face dismissals of indictments involving serious charges."

When the Government and the District Courts failed to heed the warning in Drumrond, and reiterated in United States v. Roemer, 514 F.2d 1377, 1382 (2d Cir. 1975), The Court of Appeals, in United States v. Didier, 542 F.2d 1182 (2d Cir. 1976), reversed a conviction and dismissed the indictment in a case in which the time limits with respect to re-trials was not strictly adhered to. As stated in Didier, "If they (the time limits) are to mean anything they must be enforced." United States v. Didier, 542 F.2d 1182 at 1190. (Parenthetical comment ours)

Following the denial of the motions for rehearing on September 29, 1978, the petitioner appeared in the District Court on November 6, 1978 pursuant to the request of the U.S. Attorney. Thirty-eight days had now elapsed since September 29.

Although the Mandate from the Court of Appeals was in fact filed in the District Court on October 12, 1978, neither the Assistant United States Attorney or the trial judge were aware of it on November 6, 1978 when petitioner appeared as requested. The Government thereupon requested an adjournment. The Court, stated: "Another month is not going to hurt it" (A-103) and thereupon adjourned the case to November 28, 1978.

On November 28th (60 days after the Court of Appeal denied petitioner's motion for rehearing) the Assistant United States Attorney told the Court that she did not think the mandate had come down yet. (A-105) There was further discussion as to the still unresolved prior speedy trial motions (filed the preceding November 1, 1977-over a year earlier). The Court commented (A-107):

> "I'm almost certain its' one of those that will hang for a lifetime and I don't intend to get excited about it.
>
> Maybe we'll give it another week.
>
> We could check it out and we'll put it on for December 8th, next Thursday."

On December 8th, 1978, 70 days had elapsed since the Court of Appeals' order of remand on September 29, and 57 days

had elapsed since the mandate was received in the District Court on October 12, 1978. Neither the Court nor the Assistant United States Attorney was yet aware that the mandate long since been filed, a fact which they were in any event chargeable with as a matter of law. Petitioner's counsel advised the Court that he had served his renewed motions* to dismiss for failure to grant a speedy trial upon the Government. The following then occured (A-112):

> "THE COURT: Let's put it on for another date and find out what the status is.
> Any big issue on this?
> MR. LEITEL: One of the questions we raise in our motions is dismissal for undue delay so we are making our motions at this time and we demand at the earliest possible moment disposition or trial of these charges.
> THE COURT: I'll tell you what we will do. We will put it on for a trial date for all purposes and let's set it down for January 25 -- 22nd, January 22nd."

Thus the Court postponed the case for yet another 45 days -- certainly an unreasonably lengthy postponement to decide a renewal of motions that had already been pending for over one year. Once again there would be no "prompt" decision of a

- - - - -

*The reference was to the fact that on November 6, 1978, petitioner's counsel reminded the Court that it had never decided the year-old speedy trial motions. The Court at that time had requested the defense to put them in writing again (A-105, 106), after counsel asked the Court if it wanted her to do so.

speedy trial motion (U.S. v. Didier, supra; Plan 10(c)). Thus despite the fact that the 60 day time limit is not tolled during the pendency of a speedy trial motion. (Didier, supra)

On January 23, 1979 (116 days after the Court of Appeals' denial of rehearing on September 29, 1978 and 103 days from the District Court's receipt of the Mandate on October 12, 1978) petitioner's attorney submitted a further affidavit in support of the motion. This affidavit related specifically to the period of delay subsequently occurring between October 12, 1978 and the present date of January 23, 1979 (Transcript January 23, 1979, p.5). The Court reserved decision (id. p.8) and adjourned the case for trial on February 13th (id. p. 9a), thus adding another 21 days to the already unconscionable delays.

On February 12, 1979 the Court informed petitioner that the speedy trial motions had been denied a few days earlier (See opinion, Appendix B). Later that day the petitioner's attorney informed the Court that a guilty plea would be entered upon the understanding with the Government that the speedy trial issues would be preserved for appeal and that petitioner would be allowed bail pending appeal to the Court of Appeals and, if need be, pending determination of a petition to this Court for certiorari. On February 15, 1979, a plea of guilty to one count of the indictment was entered. On April 25, 1979, petitioner was sentenced to a prison term of three years. He is at liberty pursuant to the aforesaid agreement.

It is respectfully urged that the

Eastern District Plan, and the Sixth Amendment guarantee of a speedy trial were here violated to the irreparable detriment of petitioner. Petitioner was deprived of a speedy trial following his motions for a speedy trial on November 1, 1976 and thereafter. He was deprived again of a speedy trial following the Second Circuit's remand to the District Court. Each denial by itself was an intolerable destruction of his speedy trial rights. Moreover, when taken in the aggregate, the result is a painfully manifest travesty of justice. The Government's and the Court's obligation to take the lead in ensuring a speedy trial was casually and repeatedly cast aside in favor of taking the line of least resistance.

POINT TWO

THE DENIAL OF A SPEEDY TRIAL RESULTED IN ADDITIONAL PREJUDICE TO PETITIONER

In order to fully appreciate the prejudice to petitioner's resulting from the denial to him of his speedy trial rights, the petitioner's circumstances for the last few years must be reviewed.

At the time of the return of the superseding indictment herein, petitioner was serving a state sentence of imprisonment, based upon the same acts which supported the first federal indictment, 73 CR 972. (A-61) in which, on June 29, 1976, petitioner commenced service of the federal term of imprisonment imposed by Judge Costantino on indictment 73 CR 972 (A-64). He was released in May, 1978.

The acts and crimes for which petitioner served those periods of incarceration were part of the same course of conduct which was charged in the instant indictment. Indeed, the Court noted, at the time of the sentencing of petitioner, the "the defendant had served some time before the crime which he presently stands before the Court." (Trancript, April 25, 1979, p. 15).

Petitioner was released from prison in May of 1978. Between the time of his release and the time of his subsequent sentencing in the instant case in April of 1979, he led, according to the pre-sentence report, an exemplary life. (Transcript, April 17, 1979, p. 3). In spite of his conduct since his release from prison, however, the petitioner is facing three more

years of imprisonment for similar acts which were committed prior to his incarceration, four and five years ago.

I cannot be denied that petitioner, between November 1, 1976 and June 28, 1977 sought disposition of these charges. The failure of the Court to comply with the speedy trial rules, and to act with respect to petitioner's motion to dismiss the indictment prejudiced petitioner in two distinct ways.

First of all petitioner was prejudiced because while he was serving the federal sentence on related charges, he was, by reason of the unresolved charges in this indictment subject to the disabilities which have been recognized by Congress in enacting the Interstate Agreement on Detainers. Article I of the Act states:

> "The party States find that charges outstanding against a prisoner, detainers based on untried indictment, informations, or complaints and difficulties in securing speedy trials of persons already incarcerated in other jurisdictions produce uncertainties which obstruct programs of prisoner treatment and rehabilitation."

Furthermore, and more importantly, petitioner has been prejudiced because his attempt, upon his release from prison to rehabilitate himself has gone for naught.

Upon his release from prison, petitioner obtained a job as a para-legal (Transcript April 17, 1979, p. 14), supported his ex-wife and child (Transcript April 17, 1979, p. 4) and severed connections with his former associates (Transcript April 25, 1979, p. 13). In short, he led, what the probation department termed, an "exemplary life."

To what purpose is a supposedly rehabilitative period of incarceration if, after one has shown that he can, in fact, lead a productive and law-abiding life, one is resentenced in 1979 to a further three year term of imprisonment for crimes which occurred in 1973, 1974 and 1975. Surely, this injustice is one of the types of injustice that is within the purview of the Speedy Trial Act.

Congress has, with both the passage of the Speedy Trial Act and the Interstate Agreement on Detainers, demonstrated its recognition of the legal adage, "Justice delayed is justice denied." Both laws provide machinery for the prompt and efficient resolution of criminal indictments; but in this case, the machinery broke down. Had petitioner, during theperiod of time between November 1, 1976 and June 28, 1977, been serving a state sentence, the Interstate Agreement on Detainers would have provided him with a means of disposal of the outstanding indictment. Instead, petitioner made a pro se motion seeking resolution of these charges, but to no avail.

Instead petitioner served his sentence under 73 CR 972 while the instant indictment was pending unresolved despite his

efforts to obtain a trial of the indictment. Had the instant indictment been resolved during his incarceration (June 1976 to May, 1978) he might well have served both sentences concurrently in whole or in part.

Instead, as circumstances developed, petitioner served his entire sentence only to now face three additional years of incarceration for similar acts which antedate his initial time of incarceration.

His "exemplary" conduct for nearly one year between the time of his release from prison and the time of his sentencing and the positive rehabilitative benefits accruing therefrom will be vitiated if petitioner must disrupt his rehabilitation to serve the instant sentence.

Under these circumstances, it is submitted that the violationsof the Speedy Trial Act and the Plan mandate dismissal of the instant indictment. (U.S. Const., Amend. 6).

CONCLUSION

THE JUDGMENT BELOW SHOULD BE REVERSED and THE INDICTMENT DISMISSED

Dated: November, 1979

Respectfully Submitted,

WILLIAM SONENSHINE
Attorney for Petitioner

A P P E N D I C E S

APPENDIX A

JUDGMENT AND OPINION OF THE
UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of September, one thousand nine hundred and seventy-nine.

Present:
HONORABLE IRVING R. KAUFMAN,
Chief Judge.

HONORABLE JON O. NEWMAN,

HONORABLE AMALYA L. KEARSE,
Circuit Judges,

UNITED STATES OF AMERICA, Appellee, -v- PAUL LABRIOLA, Appellant.	)	79-1196

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgment of said District Court be and it hereby is AFFIRMED.

1. Judge Costantino did not abuse his discretion under Section 9(a)(8)(A) of the Eastern District Plan for Prompt Disposition of Criminal Cases when he postponed decision on appellant's motion to dismiss his indictment pending resolution of a request for en banc review in United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), rev'd, 436 U.S. 340 (1978). See Second Circuit Guidelines under the Speedy Trial Act (Jan. 16, 1979), at 38-39. The subsequent delay, therefore, does not warrant dismissal of the indictment. See United States v. Bubar, 567 F.2d 192 (2d Cir.) cert. denied, 434 U.S. 872 (1977); United States v. Drummond, 511 F.2d 1049 (2d Cir. 1975).

2. The district court judge also acted wtihin his discretion when he adjourned proceedings after October 1978 to ascertain the status of appellant's speedy trial motion, and when he granted the request of appellant's counsel to adjourn so that a revised motion could be prepared. See Eastern District Plan Section 5(b); Bubar, supra, 567 F.2d at 208.

IRVING R. KAUFMAN,
IRVING R. KAUFMAN,
Chief Judge

JON O. NEWMAN,
JON O. NEWMAN

AMALYA L. KEARSE
AMALYA L. KEARSE.
Circuit Judges.

APPENDIX B

OPINION OF THE UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PAUL LABRIOLA,

Defendant.

----------X

75 Cr 659

ORDER

Feb. 8, 1979

COSTANTINO, D.J.

Defendant, Paul Labriola, has moved to dismiss the indictment pending against him. He contends that he has been deprived of a speedy trial. The court finds that Labriola did not withdraw his waiver of his speedy trial rights, and that in any event, no violation of his right to a speedy trial occurred. Accordingly, defendant's motion to dismiss is denied.

SO ORDERED:

MARK A. COSTANTINO
U.S.D.J.

APPENDIX C-1

ORDER OF THE UNITED STATES COURT OF APPEALS DENYING PETITIONER'S APPLICATION FOR REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of October, one thousand nine hundred and seventy-nine.

Present:

HON: IRVING R. KAUFMAN,
Chief Judge

HON: JON O. NEWMAN

HON: AMALYA L. KEARSE,

Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v. 79-1196
PAUL LABRIOLA,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant, Paul Labriola

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. Daniel Fusaro,
Clerk

APPENDIX C-2

ORDER OF THE UNITES STATES
COURT OF APPEALS DENYING
PETITIONER'S APPLICATION
FOR EN BANC HEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of October, one thousand nine hundred and seventy-nine.

UNITED STATES OF AMERICA
Plaintiff-Appellee,
v. 79-1196
PAUL LABRIOLA,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, Paul Labriola and no active judge or Judge who was a member of the panel having requested that a vote be taker on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Irving R. Kaufman
Chief Judge

APPENDIX D

STATUTES AND CONSTITUTIONAL PROVISIONS

Section 5(a)(1):

"5. Time within Which Trial Must Commence.

(a) Time Limits. The trial of a defendant shall commence within the following time limits:
(1) If the arraignment occurs before July 1, 1977, within [180] days of the arraignment;...."

Section 5(b):

"(b) Retrial. The retrial of a defendant shall commence within 60 days from the date the order occasioning the retrial becomes final. If the retrial follows an appeal or collateral attack, the court may extend the period of unavailability of witnesses or other factors resulting from passage of time make trial within 60 days impractical. The extended period shall not exceed 180 days."

Section 10(c):

"(c) Government Not Ready for Trial Within Six Months. If the government is not ready for trial within the time prescribed by section 6A, and if the defendant is charged only with non-capital offenses,

the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment or information. Any such motion shall be decided with promptness. The court's order dismissing the indictment or information shall be with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this paragraph."

Section 9(a)(8)(A):

"(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court

sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial."

SPEEDY TRIAL ACT OF 1974
Title 18 U.S. Code § 3161(e):

"If the defendant is to be tried again following an appeal or collateral attack, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final except that the Court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date occasioning the retrial becomes final if unavailability of witness or other factors resulting from passage of time shall make trial within sixty days impractical."

UNITED STATES CONSTITUTION
6th Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...."

Supreme Court, U. S.
FILED
JAN 25 1980
MICHAEL RODAK, JR., CLERK

No. 79-774

In the Supreme Court of the United States

OCTOBER TERM, 1979

PAUL LABRIOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SARA CRISCITELLI
Attorney
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-774

PAUL LABRIOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1979. A petition for rehearing was denied on October 25, 1979 (Pet. Apps. C-1 and C-2). The petition for a writ of certiorari was filed on November 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the circumstances of this case, petitioner was denied his right to a speedy trial under the Speedy Trial Act (18 U.S.C. 3161 *et seq.*) and the Eastern District Plan for Prompt Disposition of Criminal Cases.

STATEMENT

Petitioner was convicted in the United States District Court for the Eastern District of New York upon his guilty plea to one count of forging United States Savings Bonds, in violation of 18 U.S.C. 495. He was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. A).

1. In an indictment filed in the district court on March 29, 1976, petitioner and three others were charged with 38 counts of forging and uttering forged United States Savings Bonds, in violation of 18 U.S.C. 495. At arraignment, on March 30, 1976, the government announced its readiness for trial (Mar. 30, 1976 Tr. 11). Prior to trial, petitioner moved to dismiss the indictment on the ground that he had been removed from state custody pursuant to a writ of habeas corpus ad prosequendum for arraignment on the indictment, and returned from federal to state custody without having first been tried on the federal charges, in alleged violation of Article IV(e) of the Interstate Agreement on Detainers Act. In his motion, petitioner relied on *United States* v. *Mauro*, 414 F. Supp. 358 (E.D. N.Y. 1976), in which a different judge in the same district had recently decided a similar motion against the government.

At the hearing on the motion, the government indicated that an appeal would be pursued in *Mauro*

(May 12, 1976 Tr. 13-14). The district court, expressing the view that *Mauro* had been incorrectly decided, indicated that it was disposed to deny petitioner's motion and proceed with the trial (*id.* at 6). Rather than go forward with a lengthy and costly trial when the legal issue remained unresolved, petitioner agreed to an indefinite postponement of the trial pending a decision by the court of appeals in *Mauro*; at the same time he expressly waived his speedy trial right (*id.* at 13-17).

On October 26, 1976, the Second Circuit affirmed the district court's decision in *Mauro*. 544 F. 2d 588. On November 1, 1976, petitioner filed a *pro se* motion to dismiss the indictment based, *inter alia*, on the government's failure to prosecute (A. 39).[1] At a status conference on November 12, the government reiterated its readiness to proceed to trial (Nov. 12, 1976 Tr. 4). Petitioner's case was adjourned, without objection from defense counsel, pending the filing and disposition of the government's petition for rehearing en banc in *Mauro* (*id.* at 3, 6, 9). The government's petition in *Mauro* was denied on March 15, 1977, and on June 28, 1977, the district court, relying on *Mauro*, dismissed the instant indictment. The court of appeals affirmed. *United States* v. *Labriola*, 573 F. 2d 1298 (2d Cir. 1977).

On October 3, 1977, this Court granted the government's petition for a writ of certiorari in *Mauro*. 434 U.S. 816. On March 13, 1978, the government filed a timely petition for a writ of certiorari in *Labriola*, requesting the Court to dispose of the petition as appropriate in light of its decision in *Mauro*. Following this Court's decision reversing the judgment of the court

---

[1] "A." refers to the appendix in the court of appeals.

of appeals in *Mauro* (436 U.S. 340), the Court, on June 5, 1978, remanded petitioner's case to the court of appeals for further consideration in light of *Mauro*. 436 U.S. 942. Thereafter, on July 24, 1978, the court of appeals reinstated the instant indictment and, on September 29, 1978, denied petitioner's application for rehearing en banc.

2. On October 12, 1978, the mandate from the court of appeals reversing the district court's dismissal order and remanding the case for trial was filed with the district court. However, neither the court nor the parties were informed until January 1979 that the mandate had been received. In the interim, petitioner obtained two adjournments for the purpose of revising and submitting pretrial motions (A. 105-109). On December 11, 1978, petitioner filed a revised motion to dismiss the indictment on speedy trial grounds, alleging violations of the Speedy Trial Act (18 U.S.C. 3161 *et seq.*) and the Eastern District Plan for Prompt Disposition of Criminal Cases ("the Eastern District Plan") (A. 55-102). On January 23, 1979, he sought dismissal on the additional ground that he had not been tried within 60 days of the issuance of the mandate, in alleged violation of Section 5(b) of the Eastern District Plan (A. 103-104). The district court denied the motion to dismiss (Pet. App. B). On February 15, 1979, petitioner pleaded guilty (A. 15).[2]

The court of appeals affirmed (Pet. App. A), concluding that the district court did not abuse its discretion in postponing decision on petitioner's motion to dismiss the indictment pending disposition of the government's petition for rehearing en banc in *Mauro*. It

[2]Under the terms of his guilty plea, petitioner reserved the right to appeal the district court's speedy trial rulings.

further concluded that the adjournments after October 1978 to ascertain the status of petitioner's speedy trial motion and to afford petitioner an opportunity to prepare a revised motion were likewise not an abuse of discretion. Accordingly, it held that the periods of pretrial delay did not warrant dismissal of the indictment under either the Speedy Trial Act or the Eastern District Plan.

ARGUMENT

Petitioner argues (Pet. 7-24) that his rights under the Speedy Trial Act and the Eastern District Plan were violated by the delays between November 1, 1976, and dismissal of the indictment on June 28, 1977, and between October 12, 1978, and entry of his plea of guilty on February 15, 1979. In advancing these arguments, petitioner overlooks the fact that at the time of the district court proceedings in this case, neither the Act nor the Plan provided sanctions for non-compliance with the time limits, other than the Plan's sanction of dismissal for the government's failure to be ready for trial. Section 10(c) and (e) of the Plan; cf. 18 U.S.C. 3163(c). Here, the government announced its readiness for trial at petitioner's arraignment; it remained ready in November 1976, following the court of appeals' decision in *Mauro*, and in October 1978, after petitioner's indictment had been reinstated. In any event, petitioner's claims under the Speedy Trial Act and the Eastern District Plan are without merit.[3]

[3]It is not clear whether petitioner also contends that his Sixth Amendment right to a speedy trial was violated by the pretrial delay. We note that petitioner failed to raise any constitutional speedy trial claim in the courts below; he should not be permitted to raise such a claim for the first time in this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, under

1. Under the Speedy Trial Act and the Eastern District Plan, trial should have commenced within 180 days of arraignment, minus excludable time. 18 U.S.C. 3161(g); Section 5(a)(1) of the Plan. Petitioner apparently concedes that it was proper to exclude the delay between May 12, 1976, when he waived his speedy trial right pending the court of appeals' decision in *Mauro*, and November 1, 1976, when he filed a *pro se* motion to dismiss for failure to prosecute. He argues, however, that the time limits prescribed by the Act and the Plan began to run on November 1, 1976, when he allegedly withdrew his speedy trial waiver.[4]

Petitioner's argument assumes that the entire period between November 1, 1976, and dismissal of the indictment (based on the court of appeals' decision in *Mauro*) on June 28, 1977, must be counted in calculating the extent of pretrial delay. Contrary to this assumption, however, the bulk of this period is properly excludable regardless of whether petitioner's earlier waiver remained in effect. The initial period until November 12, 1976, is

---

the balancing test adopted by this Court in *Barker* v. *Wingo*, 407 U.S. 514, 530-533 (1972), the delay in this case was not unduly lengthy, much of the delay is attributable to the district court's consideration of petitioner's motion to dismiss the indictment on erroneous grounds, and petitioner has not shown that he was significantly prejudiced by the delay (see page 9 and note 6, *infra*).

[4]The November 1 motion to dismiss for failure to prosecute was patently frivolous at the time it was filed, since petitioner had without question waived any claim of a speedy trial violation until that time. Petitioner nonetheless suggests that the motion must be interpreted as a specific withdrawal of that waiver. We note, however, that the claim raised in petitioner's November 1 *pro se* motion was not pursued further by counsel in subsequent motions or hearings. Thus, it is not at all clear, as petitioner alleges, that he revoked the waiver of his right to speedy trial at that time.

explained by the prior scheduling of the next status conference. The subsequent period until March 1977, is attributable to the district court's desire to await a final decision from the court of appeals in *Mauro*. The final period complained of, until June 28, 1977, was mainly devoted to briefing, argument and decision on the motion to dismiss for violation of the Agreement on Detainers.

These periods, or at least a substantial portion of them, are excludable as periods of delay resulting from proceedings concerning the defendant (18 U.S.C. 3161(h)(1)(F), as amended by Pub. L. No. 96-43, Section 4, 93 Stat. 328, and Section 9(a)(1) of the Plan), and for continuances granted by the court on its own motion on the basis of a finding that the ends of justice would be served (18 U.S.C. 3161(h)(8)(A) and Section 9(a)(8)(A) of the Plan). Here, the district court's decision to await disposition of the government's petition for rehearing en banc in *Mauro* was a reasonable measure designed to avoid a possibly unnecessary interlocutory appeal, which the government surely would have taken if the indictment had been dismissed earlier. Such an appeal would have generated excludable time in any event, pursuant to 18 U.S.C. 3161(h)(1)(E), as amended by Pub. L. No. 96-43, Section 4, 93 Stat. 328, and Section 9(a)(1)(D) of the Plan. Moreover, the ultimate result of an earlier dismissal would not have altered the outcome – the dismissal would have been affirmed by the court of appeals, the government would have petitioned for certiorari, the case would have been remanded by this Court in light of its decision in *Mauro*, and the indictment against petitioner would have been reinstated.

2. Petitioner also complains that the district court failed to try him within 60 days after the mandate of the court of appeals issued on October 12, 1978. Here, too, it is clear that petitioner entered his guilty plea within

the time limits of the Speedy Trial Act and the Eastern District Plan, once allowance is made for excludable delay.

Although the parties and the court were unaware on November 6, 1978, that the mandate had previously issued, petitioner nonetheless requested and received time to file revised pretrial motions. The motions were filed on December 11, 1978, argued on January 23, 1979, and denied on February 8, 1979. This time period is excludable. 18 U.S.C. 3161(h)(1)(F) and (J), as amended by Pub. L. No. 96-43, Section 4, 93 Stat. 328; Section 9(a)(1)(G) of the Plan. The remaining period before the entry of petitioner's guilty plea was less than the sixty days within which retrial must commence.[5]

Furthermore, 18 U.S.C. 3161(e) and Section 5(b) of the Plan provided that the trial court may extend the period for retrial for as long as 180 days if "factors resulting from passage of time shall make trial within sixty days impractical." Prior to the time the case was dismissed by the district court on June 28, 1977, petitioner had filed several pretrial motions which he later contended had never been decided. Because of the passage of time, it was not clear which of these motions petitioner still wished to pursue after the indictment was reinstated (Nov. 6, 1978 Tr. 3-4). An extension of the sixty day period was therefore proper and permissible under the rules.

---

[5]We have assumed, for purposes of this discussion, that the retrial provisions of Section 3161(e) of the Act and Section 5(b) of the Plan apply to the period following reinstatement of the indictment. Actually, these provisions refer only to retrials.

Finally, petitioner contends (Pet. 21-24) that the pretrial delay in this case made it impossible for him to serve his sentence concurrently with another sentence he had been serving. But petitioner himself concedes (Pet. 21) that he was released from confinement on the earlier sentence in May 1978, before the instant indictment was reinstated. Thus, petitioner, who moved to dismiss the indictment for an alleged violation of the Agreement on Detainers, is himself responsible for the major portion of the delay and the resulting impossibility of serving concurrent sentences.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SARA CRISCITELLI
Attorney

JANUARY 1980

---

[6]Petitioner's contention that the sentence itself is unfair in light of his asserted rehabilitation may be properly addressed to the district court in a motion for reduction of sentence pursuant to Fed. R. Crim. P. 35. We note that petitioner fails to substantiate his claim (Pet. 22) that while serving the earlier sentence he suffered disabilities as the result of the pendency of the instant indictment.

DOJ-1980-01